

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARVIN T. SMITH)	
Claimant)	
)	
VS.)	
)	
WESTERN FEED MILLS, INC.)	
Respondent)	Docket No. 1,049,751
)	
AND)	
)	
MICHIGAN MILLERS MUTUAL INS. CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier request review of the June 16, 2010 preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes.

ISSUES

Claimant alleges he injured his back at work on February 12, 2010, when he slipped in oil and fell while rolling a truck tire out of the way. The ALJ found, by implication, claimant's testimony credible and, accordingly, ruled that claimant's injury arose out of and in the course of his employment with respondent. Consequently, the ALJ awarded claimant both medical benefits and temporary total disability benefits under the Workers Compensation Act.

Respondent argues, in essence, that claimant has failed to prove he injured his back at work as there are too many contradictions and discrepancies in claimant's description of the accident and related matters. In short, respondent requests the Board to deny claimant's request for benefits.

Claimant argues the evidence supports his claim there was oil on the floor of the mechanic shop the day of the accident. He also argues the inconsistencies between his description of the accident and that of his girlfriend are minor. Moreover, the claimant

maintains the ALJ observed the witnesses testify and, therefore, the Board should adopt the ALJ's implied finding that claimant is a credible witness. Accordingly, claimant requests the Board to affirm the June 16, 2010, Order.

The only issue before the Board on this appeal is whether claimant injured his back in an accident that arose out of and in the course of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member finds and concludes the preliminary hearing Order should be affirmed.

Claimant is employed by respondent as a mechanic. Respondent makes cattle feed and operates a mill in Cedar Vale, Kansas. Claimant maintains he fell at work on the morning of Friday, February 12, 2010, while performing a brake job on a 10-wheeled truck. Claimant described the incident as follows:

Was removing tires off of the back axles of a 10-wheeler, we were doing brake maintenance and upon removal of the tires is when I slipped and fell on some oil.¹

. . .

I landed directly on my back side and in kind of a twisting motion.

. . .

Kevin [Boswell] did come over. I asked him just to give me a hand, you know, not really thinking of the seriousness of the action that happened. Jokingly, we shrugged it off as you're playing around, you're sitting around. We never - -we never really thought of it being that serious of an incident at that time.²

Claimant did not initially believe he had sustained any injury. Indeed, claimant did not mention the incident to his supervisor, Sean Rose, when Mr. Rose gave claimant a ride home for lunch. The claimant testified, however, that during their ride back to work from lunch he told Mr. Rose about experiencing a sharp pain in his back while at home. But claimant did not initially associate that symptom with the earlier alleged fall. In addition, claimant denies falling or injuring himself at home during his lunch break.

¹ P.H. Trans. at 12-13.

² *Id.* at 14-15.

Claimant testified that following his fall, Mr. Boswell completed the work on the rear passenger brakes. Moreover, claimant testified he told Mr. Boswell that he “wasn’t feeling right and [he] was having some sharp pains running up and down [his] legs.”³ He also testified that the afternoon of his alleged accident he mentioned to Mr. Boswell that those symptoms might have been related to his fall. Also, claimant testified before leaving work on Friday he also told both Stephen Dale and Scott Boswell he had injured his back when he fell.⁴

In addition, claimant testified he saw Mr. Rose on one occasion the afternoon of the alleged accident and that he mentioned to Mr. Rose he was not feeling well and he was “hurting a little bit and . . . just kind of taking a timeout.”⁵ Claimant maintains he did not tell Mr. Rose about his alleged accident before leaving work that day as he did not believe his injury was serious or that he would be unable to work the next day.⁶

But claimant also testified that by the time he left work on Friday he was having sharp pains that shot from his back down into his legs. He maintains he did very little that weekend due to his symptoms. Claimant was scheduled to work overtime the day following the accident but he was excused. For unexplained reasons, claimant did not mention that he had injured his back at work the day before when he telephoned Mr. Rose on Saturday to advise he would not be working that day. Claimant believes he left a message for Mr. Rose and he may have stated that he had been experiencing severe pain but claimant could not recall his message with any certainty when he testified at his preliminary hearing. Mr. Rose, however, believes he spoke to claimant over the telephone that Saturday morning and that claimant merely said he had been dealing with ‘stuff’ since 4 a.m. and, therefore, he would not be coming into work.

Claimant maintains his back worsened as the weekend progressed. On Monday morning, February 15, 2010, claimant telephoned respondent and advised he was going to the doctor. Later that morning, claimant saw Dr. James M. McDermott, who took claimant off work. The doctor’s medical notes from February 15, 2010, reflect the following history:

Pt. is into the clinic this morning with complaints of low back pain. Apparently he injured his back at work. He was lifting, pulling and doing a lot of tugging at work and felt some pain and pressure in his low back. He tells me that by Saturday morning he was unable to get out of bed and was having numbness and tingling in

³ *Id.* at 40-41

⁴ *Id.* at 42.

⁵ *Id.* at 46.

⁶ *Id.* at 54.

his left leg. He tells me that his pain has gotten significantly worse. He has been taking Tylenol and Ibuprofen and applying heating pack to his back without any improvement in his pain. He denies any history of back injury.⁷

The doctor noted he was dealing with a workers compensation injury.

Claimant and his girlfriend, Holly Unruh, left the doctor's office and drove directly to respondent's mill where they spoke with Mr. Rose. Claimant contends he told Mr. Rose at that time about his slipping and falling at work on Friday. Claimant testified, in part:

I told him [Mr. Rose] that I hurt my back Friday morning when I slipped in the oil and that's to the best conclusion I could even figure out how I did it. It was the only strenuous thing that I did within that three days that occurred.⁸

Ms. Unruh, who overheard the February 15 conversation between claimant and Mr. Rose, likewise testified that claimant advised Mr. Rose about falling at work on Friday. She also testified it was her understanding that claimant slipped in oil and fell while he was taking a tire off a truck.

The claimant next spoke with Mr. Rose on February 19, 2010, following claimant's second appointment with Dr. McDermott.

In short, Mr. Rose contradicts claimant's testimony. Mr. Rose does not recall claimant commenting about having a sharp pain on their ride back to work from lunch; does not recall claimant mentioning he was hurting on Friday afternoon. Moreover, Mr. Rose denies that during their conversation on Monday, February 15, claimant said he had fallen at work. Rather, Mr. Rose testified claimant said he did not know how he was injured but claimant believed it had occurred at work because he had not done anything over the weekend.⁹ Mr. Rose acknowledges he wanted claimant to identify a specific place or event at work where or when he injured his back, but claimant could not do that in their February 15 conversation or when they later talked on February 19, 2010.

Neither Kevin Boswell nor Thomas Leis, both of whom worked alongside claimant at different times on February 12, recall helping claimant up from the floor after falling or hearing claimant say he had fallen. But they both remember that claimant mentioned that his back was hurting that afternoon. Mr. Boswell, who helped claimant with the rear driver side brakes the morning of the alleged accident, testified that claimant did not provide any specifics regarding his back complaints.

⁷ *Id.*, Cl. Ex. 1 at 4 (Feb. 15, 2010 office note).

⁸ *Id.* at 23.

⁹ *Id.* at 62.

Mr. Leis, who maintains he helped claimant with the rear passenger side brakes the afternoon of the alleged accident, testified that claimant complained of his back while they were working on a tool box on another truck. Moreover, Mr. Leis testified that claimant also mentioned he had experienced back problems since he was a teenager. But, according to Mr. Leis, claimant did not indicate that anything had happened that day at work. Mr. Leis, who had worked with claimant on approximately 10 other occasions, acknowledged that claimant had never previously made back complaints.

Claimant testified his previous back symptoms, or those which he could recall, occurred during his tenure in the Army when they dug foxholes or ran 10 miles. And he described those symptoms as being only temporary.

On February 16, 2010, claimant underwent an MRI of his lumbar spine. The medical report associated with that test notes claimant injured his back as he "[t]wisted lifting at work." When claimant followed-up with Dr. McDermott on February 19, 2010, the clinic noted claimant "was injured at home when a tire of a big diesel slipped." But claimant specifically denied such an incident occurred and, indeed, Dr. McDermott and his physicians assistant sent a letter to claimant's attorney dated May 27, 2010, in which they concluded the history recorded in the February 19 office notes must have resulted from a communication error.

At his attorney's request, claimant met with Dr. Pedro A. Murati in early April 2010. The doctor noted that on February 12, 2010, claimant was working on the rear brakes of a truck when he slipped in oil, a tire landed on his toe, and claimant twisted his back. The doctor, however, also recorded that an accident report was prepared at that time.

The ALJ considered the above evidence and concluded claimant injured his back at work. And although claimant may be a somewhat poor historian, the undersigned agrees. At this juncture the record establishes that claimant worked several months for respondent as a mechanic working on heavy trucks. There is no evidence that during his tenure with respondent that claimant had complained of his back before the alleged incident on February 12, 2010. It is uncontradicted that during the afternoon of Friday, February 12, claimant told both Mr. Boswell and Mr. Leis that his back was hurting. Indeed, at this juncture it is uncontradicted that on the alleged date of accident claimant told both Scott Boswell and Stephen Dale that he had injured his back at work that day when he fell.

Claimant acknowledges that he did not immediately notify his supervisor of the alleged slip and fall. But that is reasonable as claimant did not initially realize he had been injured. Likewise, it is not unreasonable to believe that claimant failed to notify his supervisor of the incident before leaving work that day as he did not realize the magnitude of his injury but believed instead that he would be back at work the next day. And although respondent's witnesses seem sincere, the undersigned finds no reason to disturb the ALJ's implied finding that claimant was credible.

In summary, by the barest of margins the undersigned Board Member finds claimant injured his back on February 12, 2010, in an accident that arose out of and in the course of his employment with respondent.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹¹

WHEREFORE, the undersigned Board Member finds and concludes the June 16, 2010, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2010.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Joseph R. Ebbert, Attorney for Respondent and its Insurance Carrier
Raymond L. Connell, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

¹⁰ K.S.A. 44-534a.

¹¹ K.S.A. 2009 Supp. 44-555c(k).